

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA**

**UNITED STATES OF AMERICA,
Plaintiff,**

v.

Criminal No. 1:05CR4

**DANIEL WILSON TESTERMAN
Defendant.**

**MOTION TO ADMIT TESTIMONY OF WITNESS
AND INCORPORATED MEMO OF LAW**

Now comes the United States of America, and Thomas E. Johnston, United States Attorney for the Northern District of West Virginia, by Sherry L. Muncy, Assistant United States Attorney, and files its memo of law in support of the testimony of Melissa Testerman.

Melissa Testerman was the wife of the defendant at the time of the crime in this case. On June 10, 2005, Ms. Testerman was interviewed by Special Agent Ken LaVictoire and this Assistant United States Attorney. An FBI 302, report of her testimony, has been prepared and will be forwarded to the defendant as an attachment to this memo.

Ms. Testerman has chosen to give testimony in the trial of United States v. Testerman, scheduled for February 7, 2006, in Clarksburg, West Virginia. There are two distinct types of testimony covered by the marital privilege, the confidential communications privilege and the adverse testimony privilege. The confidential communications privilege covers testimony that includes confidential statements made between spouses and are inadmissible. The testimony of Melissa Testerman contains no confidential statements made by the defendant. However, the adverse testimony privilege is held by the testifying spouse. While the spouse may assert the privilege to refuse to testify and may not be compelled to testify against the spouse, a spouse may choose to testify. Ms. Testerman holds the right to assert the privilege. *Trammel v. United*

States, 445 U.S. 40, 53, 100 (1980), *United States v. Parker*, 834 F.2d 408, 411 n. 4 (4th Cir. 1987).

WHEREFORE, the United States moves that the testimony of Melissa Testerman be permitted in the above-styled trial.

Respectfully submitted,

THOMAS E. JOHNSTON
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that I, Sherry L. Muncy, Assistant United States Attorney for the Northern District of West Virginia, electronically filed the foregoing **MOTION TO ADMIT TESTIMONY OF WITNESS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to George J. Cosenza, counsel for the defendant, Daniel Wilson Testerman. A copy of the memo of law including an FBI 302 interview summary will be forwarded via fax to (304) 485-1090, and by first class mail to George J. Cosenza, Cosenza & Merriman, PLLC, 515 Market Street, P. O. Box 4, Parkersburg, WV 26102, this 23rd day of January, 2006.

THOMAS E. JOHNSTON
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